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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 277

UTAH PHARMACEUTICAL ASSOCIATION, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c) of the Revised Rules of this Court, appellee moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of the district court entered on January 31, 1962, adjudging that appellant, Utah Pharmaceutical Association, conspired with others to restrain interstate commerce in prescription drugs in violation of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1.[1]

[1] The judgment of the district court is set out in the appendix *infra*, pp. 17-21. The district court opinion and the trial stipulations are reproduced in the appendix to appellant's Jurisdictional Statement, J.S. 1a-13a, 19a-63a. Items in the stipulations adopted by the district court (J.S. 13a) are cited herein by the section and paragraph numbers in the stipulations as well as by the page location in the appellant's appendix (e.g., "Stip. I-7, J.S. 22a").

The complaint, filed March 7, 1961, charged that from 1954 to the date of the complaint the Utah Pharmaceutical Association had conspired with its officers and members, various local pharmaceutical associations and other persons unknown to "establish and maintain uniform prices for prescription drugs sold to consumers in Utah" (Complaint, p. 4). The complaint further alleged that the co-conspirators had agreed: (1) to adopt a prescription pricing schedule formulated by the Association; (2) to distribute said schedule to members of the Association; (3) to revise said schedule and distribute it, as revised, to the membership of the Association; and (4) to urge and induce members of the Association and the local pharmaceutical associations to fix uniform retail prices for prescription drugs by use of said schedule (*id.*, pp. 4–5).

Before trial, the parties stipulated to certain facts and also to the authenticity of various documentary exhibits. The record before the trial court consisted of these stipulations and exhibits, a deposition submitted by the plaintiff, and the testimony of one witness called by the appellant. The case was heard on November 21 and 22, 1962, by Judge A. Sherman Christenson who, after considering all the evidence, entered an opinion on January 3, 1962, holding that the Association had violated Section 1 of the Sherman Act by conspiring to fix the retail price of prescription drugs (J.S. 1a–13a). The district court adopted as its findings of fact the stipulations of the parties, as qualified and supplemented by its opinion (J.S.

13a). On January 31, 1962 the court entered judgment against the defendant, enjoining it from continuing the conspiracy, from using or disseminating prescription pricing schedules and from maintaining a committee on prescription pricing, and providing other relief (App., *infra*, pp. 18–20). A motion for new trial was denied on February 21, 1962 (J.S. 16a).

The following salient facts were stipulated to by the parties and found by the court.

1. THE APPELLANT

The appellant, Utah Pharmaceutical Association, is a corporation organized under the laws of Utah with offices in Salt Lake City (Stip. I–1, J.S. 19a). Originally its membership consisted principally of drugstore owners and managers, but in 1959 active membership was limited to registered pharmacists (Exh. A). Of 255 licensed pharmacists in Utah in 1960, 195 were represented in the Association (Stip. I–38, J.S. 27a). The Association published the Utah Pharmaceutical Association Bulletin News as its official publication, and its executive-secretary was the editor and manager of the Bulletin (Stip. VIII–4, J.S. 57a).

2. INTERSTATE COMMERCE

It was stipulated that "[m]ost of the drugs used to fill prescriptions in the State of Utah are manufactured outside the State of Utah and are shipped from the place of manufacture either to wholesale drug

firms located in the State of Utah or directly to pharmacies within the State of Utah" (Stip. I–7, J.S. 22a). The dollar volume of prescription sales to consumers in Utah was admittedly "substantial" (Stip. I–6, J.S. 22a), as was the dollar volume of sales to pharmacies in Utah by drug manufacturers and drug wholesalers in the regular course of their business (Stip. I–8, J.S. 22a). Most of these drugs are sent to the pharmacist in quantities of 25, 50, 100, 500 and 1,000 in the original package or container of the manufacturers (Stip. I–9, J.S. 22a). They are sold in smaller quantities by the pharmacist, who charges for the prescription and collects a sales tax upon the entire price (Stip. I–18, 19, J.S. 23a). In the period covered by the complaint over 90% of the prescription drugs sold to consumers in Utah were sold as manufactured, and were not compounded or changed in any way by the pharmacist (Stip. I–5, J.S. 22a).

3. THE CONSPIRACY

From 1955 to 1959 the Association had maintained a standing committee (Exhs. 21, 87) called the "U. Ph. A. [Utah Pharmaceutical Association] Committee on Rx Pricing, Wages and Hours" (Stip. I–17, J.S. 23a), whose members were appointed by the president of the Association (Stip. IV–36, J.S. 36a; Exhs. 35, 95). In May 1955 the first prescription pricing schedule was prepared for the Association by Dr. Ewart Swinyard of the University of Utah College of Pharmacy (Stip. I–13, J.S. 23a; Exh. 7), who was a member of the Rx Pricing Committee (Stip. I–17, IV–14, J.S. 23a, 33a). Dr. Swinyard presented this pricing schedule to the

members of the Association at their annual convention (Stip. IV–44, IV–45, J.S. 38a). This pricing schedule was then printed under the Association name and distributed without charge to all drugstores in Utah in August 1955 (Stip. IV–1, IV–41, J.S. 30a, 37a). From 1955 to 1959, the Rx Pricing Committee was active in formulating numerous revisions of the prescription pricing schedule (Stip. I–13, I–14, I–15, I–16, J.S. 23a; Exhs. 17b, 20, 71, 72, 84), all of which were distributed to the members of the Association (Stip. IV–2, IV–10, J.S. 30a, 32a; Exh. 37).[2]

Besides preparing and distributing its pricing schedules, appellant continually urged its members to use such schedules. The July 1955 edition of the Association's Bulletin News called the schedule "the real answer to better prescription pricing in Utah," adding that "[p]rogressive druggists all over the state are adopting it" (Exh. 6). In January 1957 an article in the Bulletin News by two members of the Rx Pricing Committee stated: "It is urged that Utah pharmacists use this schedule as a basis for consistent and fair pricing throughout the State" (Stip. VI–16, J.S. 46a). The July 1957 Bulletin News urged pharmacists to "get

[2] That the Rx Pricing Committee was acting on behalf of the Association in revising these schedules is illustrated by an article in the Association Bulletin News stating:

"U. Ph. A.'s Committee on Prescription Pricing has been authorized by the Board of Directors to; Revise the present Rx Pricing Schedule; have 500 copies printed; plasticize 100 copies which the U. Ph. A. secretary will send to pharmacies for a $2 bill" (Stip. VI–45, J.S. 51a).

Furthermore, in an article in the Bulletin News the President of the Association referred to "our new Prescription Pricing Schedule." (Stip. VI–35, J.S. 49a).

a pricing schedule from U. Ph. A. and use it. It is the only fajr deal to you and your customer" (Stip. VI-39, J.S. 50a).

In March 1959 Doug Hendricks, then a director of the Association, wrote in the Bulletin News that "a 14 hour shift in a one-man store is no problem at all compared to getting the local boys to agree on an ethical Rx pricing policy" (Exh. 92). The Bulletin News of June 1959 announced a new pricing schedule would be distributed at the annual convention and urged members to get a copy and "be sure to use it. Refer to it oftener than you do the Good Book. Have as much faith in it too" (Exh. 27a).

Dr. Swinyard attended many meetings of the local pharmaceutical associations to discuss prescription pricing schedules (Exhs. 14, 15, 18, 19), and demonstrate the use of the Association's schedule (Stip. IV-8, J.S. 31a; Exhs. 16, 17, 25). The Association also organized special meetings of the county pharmaceutical associations to discuss the use of the pricing schedule (Stip. I-20, I-25, I-26, I-27, IV-37, J.S. 24a-25a; Exhs. 36, 61, 96).

ARGUMENT

Appellant's jurisdictional statement challenges (J.S. 3-4) each of the four determinations made by the court below: (1) that the alleged conspiracy to fix retail prices of prescription drugs was a restraint involving interstate commerce; (2) that the professional status of pharmacy did not immunize appellant's conduct from the Sherman Act; (3) that appellant's publication and distribution of a prescription pricing schedule with an intent to promote price uniformity

constituted an illegal conspiracy to fix prices; and (4) that such conspiracy could not be justified, since it constituted a *per se* violation of the Sherman Act (J.S. 4a–5a). We submit that the decision below was correct and that none of the questions raised by appellant is substantial.

1. The court below properly concluded that the case was within the jurisdictional reach of the Sherman Act because "the questioned activities of the Association affected interstate commerce and * * * the goods involved were in the flow of interstate commerce at the time with which we are concerned" (J.S. 7a). As shown by the Statement (*supra*, pp. 3–4), there was ample evidence to support the court's finding that the prescription drugs remained in the flow of interstate commerce, for the purposes of the Sherman Act, until they reached the ultimate consumer.[4] This Court has long recognized that inter-

[3] The Ninth Circuit reached similar conclusions on issues of commerce, professional status of pharmacy, and conspiracy to fix prices by use of pricing schedules, in recently affirming a criminal conviction under the Sherman Act of another pharmaceutical association and an individual for conspiracy to fix retail prices of prescription drugs. *Northern California Pharmaceutical Ass'n v. United States*, 1962 Trade Cases, ¶ 70,279 (C.A. 9), pending on petition for writ of certiorari, No. 276, this Term. The court there stated that: "On the matter of agreement to fix prices, the instant case * * * is on all fours with *United States v. Utah Pharmaceutical Association*, — F. Supp. — (D. Utah, 1962), a decision the reasoning of which, and its result we find highly instructive and persuasive on the several issues involved herein" (*id.* p. 26,566).

[4] In each of the following cases the product involved was held to remain in the flow of interstate commerce until it reached the ultimate consumer in intrastate retail sales: *Northern California Pharmaceutical Ass'n v. United States*, 1962 Trade Cases,

state commerce is "not a technical legal conception, but a practical one, drawn from the course of business" (*Swift & Co.* v. *United States*, 196 U.S. 375, 398). In the present case, there was a practical continuity of movement from the manufacturer to the retailer and on to the consumer (*United States* v. *Chrysler Corp.*, 180 F. 2d 557, 559–60). The objective of the interstate movement is, of course, the ultimate distribution by retail sales and the flow of commerce continues until then. As the court below noted, the pharmacist is the "sole conduit from sources outside the State of Utah to the consumers" (J.S. 7a). Cf. *Las Vegas Merchant Plumbers Ass'n* v. *United States*, 210 F. 2d 732, 740 (C.A. 9).

Moreover, even assuming *arguendo* that the retail sales of prescription drugs were wholly intrastate transactions after termination of the flow of interstate commerce, it is settled that such transactions are within the Sherman Act if they affect interstate commerce. (*United States* v. *Frankfort Distilleries, Inc.*,

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¶70,379 (C.A. 9) (prescription drugs); *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363, 366 (C.A. 8) (milk); *United States* v. *General Motors Corp.*, 121 F. 2d 376, 401 (C.A. 7), certiorari denied, 314 U.S. 618 (automobiles); *United States* v. *Erie County Malt Beverage Distrib. Ass'n*, 1957 Trade Cases, ¶68,590, p. 72,376 (W.D. Pa.), affirmed, 264 F. 2d 731 (C.A. 3) (alcoholic beverages); *United States* v. *Gasoline Retailers Ass'n*, 1960 Trade Cases, ¶69,596, p. 76,395 (N.D. Ind.), affirmed, 285 F. 2d 688 (C.A. 7) (gasoline). The fact that a prescription is prerequisite to the retail sale of drugs does not break the flow of the commodity from manufacturer to ultimate consumer, any more than would the regulatory aspects involved in distribution of alcoholic beverages, building materials to licensed contractors, etc.

324 U.S. 293, 298).[5] "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze" (*United States* v. *Women's Sportswear Ass'n*, 336 U.S. 460, 464). Here the evidence proved that appellant conspired to fix the price of prescription drugs in sales from the pharmacy to the consumer, a practice which would inevitably affect the price of the goods in their interstate movement from the manufacturer to the pharmacy. As was stated in *United States* v. *General Motors Corp.*, 121 F. 2d 376, 398 (C.A. 7), certiorari denied, 314 U.S. 618:

> Now it is quite impossible to consider the independent retail market and wholesale market as one apart from the other, for obviously without the retail sale there would be no wholesale transaction. Any restraints which affect the wholesale market necessarily must be reflected in the retail sales and, likewise, any restraints affecting the retail market necessarily affect the wholesale transaction.

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[5] Contrary to appellant's statement (J.S. 7, 18), the government at no point below waived reliance upon effect on interstate commerce as sustaining federal jurisdiction. In the oral argument in chief on this point, government counsel specifically posed the commerce issue as raising both "flow" and "effect" (Transcript of Nonjury Trial, Nov. 21 and 22, 1961, p. 61): "Unless the Government convinces you that the drugs in question are in the flow of interstate commerce or that the activities of the association substantially affected interstate commerce, then this Court has no jurisdiction and we have no case."

In the passage in the government's rebuttal cited by appellant (Tr. 250), counsel emphasized the movement of the drugs in interstate commerce ("flow") to distinguish several cases dealing with local services (see Tr. 248–250). But there was no concession or waiver on the "effect" ground.

See also *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 234.

Dispositive on this point is *United States* v. *Sullivan*, 332 U.S. 689, in which the Court sustained the application of federal labeling requirements to drugs which were being held by retail druggists for intrastate sales, after having previously moved in interstate commerce. This regulation was held to be within "the constitutional power of Congress under the commerce clause" (332 U.S. at 697–698). See also *United States* v. *2600 State Drugs*, 235 F. 2d 913, 917 (C.A. 7), certiorari denied, 352 U.S. 848. Since "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied" (*United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 298), the intrastate retail sales of drugs must also be subject to the Sherman Act.[6]

[6] The reliance of appellants (J.S. 16) upon *Eli Lilly & Co.* v. *Sav-on-Drugs*, 366 U.S. 276, is misplaced. In that case, the Court considered the scope of a New Jersey statute requiring certification of foreign corporations doing business in the state. It held that a drug manufacturer which had an office and employed "detailmen" in the state did intrastate as well as interstate business and was subject to the state law. The case did not touch upon the reach of federal authority under the commerce clause or consider at all the specific question of interstate commerce for purposes of the Sherman Act. As this Court pointed out in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 545: "past decisions of this Court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy grounds to determine Congressional power under the commerce clause." See also *Stafford* v. *Wallace*, 258 U.S. 495, 525; *Northern California Pharmaceutical Ass'n* v. *United States*, 1962 Trade Cases, ¶70,379, p. 76,563 (C.A. 9).

2. The second question presented by appellants is whether their activity constituted a restraint solely on the practice of pharmacy as a learned profession and therefore lay outside the purview of the Sherman Act (J.S. 3, 19). In *American Medical Ass'n* v. *United States*, 317 U.S. 519, this Court found it unnecessary to decide whether the practice of medicine was a "trade" within the meaning of the Sherman Act, when it upheld the conviction of physicians' societies and individual physicians for restraining the business of Group Health Insurance, a corporation engaged in providing prepaid medical care and hospitalization. The Court held that (p. 528):

> * * * the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was such obstruction and restraint of the business of Group Health.

The Sherman Act is addressed to "[e]very person". The professional status of individuals or organizations is "of no significance" (p. 529).

In the present case, the complaint alleged a restraint on the "interstate trade and commerce in prescription drugs" (p. 4). Since the manufacture and sale of prescription drugs is clearly "trade" within the meaning of the Sherman Act, the conspiracy alleged and proved here was plainly a restraint upon trade.[7] As in *American Medical Ass'n,*

[7] This is true even where the professional skill of the retail pharmacist has contributed to the preparation of the drug. It is *particularly* true here, where it was stipulated that over

the fact that the conspirators were a professional organization and members of a profession is immaterial. The true nature of appellant's conduct was pointed out by the court below when it said: "* * * the factor of services in going to make up the [prescription pricing] schedule is considerably less determinative than wholesale drug prices. * * * There could be many better means for dealing primarily with the price or cost of the services of a professional pharmacist without involving an agreement for the uniform pricing of the drugs themselves" (J.S. 9a). In fact, the pricing schedule at issue regulates "only the gross return of the store for the dispensing of the drugs", not matters of strictly professional nature, and provides a method for determining "retail price" (J.S. 9a).

It is not necessary, therefore, to determine whether pharmacy is a "trade" within the meaning of the Sherman Act, since the offense alleged in the present case was a restraint on the sale of prescription drugs and not a restraint on the practice of pharmacy. As the court stated in *Northern California Pharmaceutical Ass'n* v. *United States*, 1962 Trade Cases, ¶70,379 (C.A. 9):

> We do not decide that every action of professionals is within the reach of the Sherman Act. We do decide that an agreement among professionals to fix a commodity price is (*id.*, p. 76,562).

90% of the drugs sold to Utah consumers were sold as manufactured, and were not compounded or changed in any way by the pharmacist. (Stip. I-5, J.S. 22a; see p. 4, *supra*.)

3. The third question raised is whether it was proved that appellant conspired to establish and maintain uniform prescription prices (J.S. 3, 21). Appellant concedes that it "caused to be published and caused to be distributed a particular pricing schedule" (J.S. 22). It argues, however, that there was no proof of adoption of the schedule by appellant or of an agreement to fix prices by circulating such schedules (*ibid.*). However, the facts amply support the court's conclusion that "the officers and directors [of appellant], with the intent of establishing uniform prices * * * adopted a pricing schedule and successive revisions, distributed them to members throughout the state and urged and induced the members to use the schedule for the pricing of prescription drugs" (J.S. 9a–10a). Thus, as pointed out in the Statement (*supra*, pp. 4–6), there was evidence that the Association had organized a Rx Pricing Committee; that this committee helped formulate a prescription pricing schedule; that this schedule, and subsequent revisions, were published by the Association under its name and distributed without charge to all drugstores in Utah; and that the actions of the Rx Pricing Committee had been expressly authorized by the Board of Directors of the Association. Such evidence clearly supports the district court's finding that the Association had "adopted" the pricing schedule. Furthermore, there was clear evidence of an active campaign by the Association to induce pharmacists to use its schedule. Since (as appellant

admits, J.S. 19), use of the schedule would necessarily result in uniform prescription prices, the court properly inferred that in actively urging use of the schedule, appellant intended the natural result of its actions—*viz*, establishment and maintenance of uniform prescription prices.

In any event, since appellant is an association of competitors, its publication and dissemination of pricing schedules, without more, violates the antitrust laws. In *United States* v. *Nationwide Trailer Rental System*, 156 F. Supp. 800, 805, affirmed *per curiam*, 355 U.S. 10, the court concluded that "the publication, adoption and circulation of the schedule, while not fixing a rigid price, was such a tampering with prices as is forbidden by the Sherman Act." *See* also *Northern California Pharmaceutical Ass'n* v. *United States*, 1962 Trade Cases, ¶70,379, p. 76,566; *Plymouth Dealers Ass'n of Northern California* v. *United States*, 279 F. 2d 128, 133 (C.A. 9). We submit that the publication and distribution of the pricing schedules necessarily exerted a stabilizing influence on the price of prescription drugs. "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate commerce is illegal *per se*" (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223).

4. Moreover, once appellant has been found to have engaged in a conspiracy to fix the price of prescription

drugs, all arguments that the restraint may be justified under the Rule of Reason must fail. Appellant urges that its actions were reasonable because "merely part of a plan to induce self-regulation of fees within the profession of pharmacy and therefore justified under the provisions of the Sherman Act" (J.S. 3–4, 24). But it is beyond cavil that price-fixing is illegal *per se*. (*United States* v. *Socony-Vacuum Oil Co., supra; United States* v. *Trenton Potteries Co.*, 273 U.S. 392): "Price fixing is *per se* an unreasonable restraint of trade. It is not for courts to determine whether in particular settings price fixing serves an honorable or worthy end" (*United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485, 489). "In short, there is no defense to price-fixing on the ground that it is reasonable or that it is being done by professionals" (*Northern California Pharmaceutical Ass'n* v. *United States*, 1962 Trade Cases, ¶70,379, at p. 76,561).

5. The final contention of appellant—that the broad scope of the final judgment would permit unreasonable searches and seizures by the government (J.S. 4, 26)—is clearly without merit. The access provision of the court's judgment expressly states that the "reasonable access" granted the government is "subject to any legally recognized privilege." (Par. VII, App. *infra*, pp. 20–21). A similar access provision was reviewed and approved by this Court in *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 725–728.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

LIONEL KESTENBAUM,
PATRICK M. RYAN,
Attorneys.

AUGUST 1962.

APPENDIX

Final Judgment

Plaintiff, United States of America, having filed its complaint herein on March 7, 1961; defendant Utah Pharmaceutical Association having filed its answer to said complaint on August 4, 1961; the matter having been tried on November 21 and 22, 1961; and the court having filed its memorandum decision on January 3, 1962;

Now, therefore, it is hereby ordered, adjudged and decreed as follows:

I

This court has jurisdiction of the subject matter and of the parties hereto. Defendant has combined and conspired with its officers, directors and members and with various local pharmaceutical associations to restrain trade and commerce in the sale of prescription drugs in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

As used herein:

(a) "Prescription drug" is a medication for treatment of humans, sold to fill a prescription written by a physician or other person duly licensed to prescribe for the treatment of human ailments;

(b) "Pharmacist" is an individual duly licensed to fill prescriptions written for the treatment of human ailments;

(c) "Prescription pricing schedule" is a formula or price list designed for use in computing prices to be charged for prescription drugs;

(d) "Person" is any individual, firm, partnership, corporation, association, trustee or any other business or legal entity.

III

The provisions of this decree shall apply to defendant Utah Pharmaceutical Association, its officers, directors, agents, members and employees, and other persons in active concert or participation with said defendant who shall receive actual notice of this decree by personal service or otherwise.

IV

Defendant is hereby perpetually enjoined and restrained from, directly or indirectly:

(a) Continuing to carry out the combination and conspiracy to restrain the sale of prescription drugs as found herein, or any like or similar combination or conspiracy to restrain trade and commerce in the sale of prescription drugs, or any combination or conspiracy having a like or similar purpose or effect;

(b) Entering into, adhering to, maintaining or furthering any contract, agreement, understanding, plan or program (i) to fix, determine, maintain or suggest prices or other terms or conditions for the sale of prescription drugs, (ii) to formulate, adopt, issue, distribute, recommend or suggest the use by any pharmacist or any other person of any prescription pricing schedule or other list, formula, guide, schedule, or method for pricing prescription drugs;

(c) Advocating, suggesting, urging, inducing, compelling, or in any other manner influencing or attempting to influence any person to use or adhere to

any prescription pricing schedule or schedules or any other list, formula, guide, schedule or method for pricing prescription drugs;

(d) Policing or making individual contact with any pharmacist or other person or devising or putting into effect any procedure to ascertain, determine, fix, influence, or suggest the price at which any prescription drug is or may be sold by any pharmacist, or the professional fee charged or to be charged by any pharmacist in connection with the sale of any prescription drug.

Nothing in sub-sections (b), (c), or (d) of this section IV shall be construed to restrain any pharmacy owner member of defendant Association from requiring his employees to sell prescription drugs at prices, and upon terms and conditions of sale, established by such pharmacy owner in pharmacies owned or operated by said pharmacy owner.

At any time, any agency of the United States or of the State of Utah may, upon grounds of undue hardship to it, and without having standing as a party herein, petition this court for an order enabling defendant Association to negotiate and enter into a contract for the sale of prescription drugs where the price of such prescription drugs will be paid for by the petitioning agency. Such petition may be in the form of a letter to the court with copies to be served on both the plaintiff and defendant herein. The matter will then be set for hearing at which time the petitioning agency may produce witnesses and other evidence in support of its petition. Plaintiff and defendant will be permitted to be heard and make objections to any such proposed negotiation or contract. Permission by this court to enter into any such contract shall not be considered an adjudication as to the legality or ille-

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gality of such contract under the antitrust laws, nor shall it be deemed to bar or estop the plaintiff from attacking the legality of any such contract under the antitrust laws generally.

V

Defendant Association is hereby ordered and directed to dissolve its committee on Prescription Pricing, Wages and Hours, and is enjoined and restrained from forming, appointing, or maintaining such committee or any similar committee.

VI

(a) Defendant Utah Pharmaceutical Association is ordered and directed, within 30 days after the entry of this final judgment, to serve by mail upon each of its members a conformed copy of this final judgment. Said defendant is further ordered and directed to thereupon file an affidavit with the clerk of this court that it has done so, which affidavit shall set forth the name and address of each person so served;

(b) Defendant Utah Pharmaceutical Association is ordered and directed to furnish a copy of this final judgment upon each new member thereof at the time of acceptance of such membership and to obtain from each such member, and keep for ten years in its files, a receipt therefor signed by each such new member.

VII

For the purpose of securing compliance with this final judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant, and subject to any legally recognized privilege, be permitted:

(a) Reasonable access during the office hours of the defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the defendant, relating to any matters contained in this final judgment; and

(b) Subject to the reasonable convenience of the defendant, and without restraint or interference from it, to interview officers and employees of the defendant (who may have counsel present) regarding such matters.

VIII

Jurisdiction is retained for the purpose of enabling any of the parties to this final judgment to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of the final judgment, for the modification or vacating of any of the provisions thereof, and for the enforcement of compliance therewith and the punishment of violation thereof.

Dated: January 31, 1962.

(S). A. SHERMAN CHRISTENSON,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE 1962